UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WAYNE A. RITCHIE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

/

No. C 00-03940 MHP

MEMORANDUM & ORDER
Plaintiff's Motion for Summary Judgment

Plaintiff Wayne Ritchie has alleged in this action that the Central Intelligence Agency and the Bureau of Narcotics tested psychoactive drugs on unknowing and unwitting American citizens including plaintiff during the 1950s, and that this non-consensual testing drove plaintiff to commit an armed robbery on December 20, 1957. Plaintiff initially filed claims against the United States of America under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. ("FTCA"), and against Robert V. Lashbrook and Ira Feldman under the First, Fourth, Fifth and Eighth Amendments to the United States Constitution. Plaintiff sought twelve-million dollars in compensatory damages, as well as costs and attorneys' fees.

The court previously dismissed plaintiff's constitutional claims, but has allowed plaintiff to proceed under the FTCA. Now before the court are plaintiff and defendant's cross-motions for summary judgment. Defendant has filed for complete summary judgment on the issue of causation, arguing that plaintiff cannot prove that he was administered lysergic acid diethylamide (LSD) by the United States government in 1957, and that even assuming that he had been dosed with LSD, he cannot prove that the LSD caused him to commit the armed robbery that gave rise to this action. Plaintiff has moved for summary judgment on the particular issue of whether "Wayne Ritchie was an

unwitting LSD victim of CIA Subproject 42."[1] Having considered the arguments presented and for the reasons stated below, the court enters the following memorandum and order.

BACKGROUND

As explained in this court's July 1, 2002, Memorandum and Order, plaintiff, a former Deputy United States Marshal, alleges that he was unwittingly given food or drinks that were laced with lysergic acid diethylamide (LSD) or another psychoactive drug while he was attending a holiday party in the United States Post Office Building on December 20, 1957. Compl. ¶ 12. According to plaintiff's uncontradicted declaration, Ritchie first arrived at his office's Christmas party at approximately noon on December 20, 1957. Ritchie Dec. ¶ 5. He drank a single bourbon and soda and returned to his office shortly thereafter. Id. Two hours later, Ritchie re-entered the party and consumed three or four more drinks. Id. at 6. Plaintiff then began to feel paranoid and imagined that his fellow officers and co-workers had turned against him. Id. at 7. He left work, returned home briefly, and then visited four bars, where he consumed a total of two more drinks. Id. at 7-9. Still fueled by paranoia, plaintiff then resolved to hold up a bar and returned to his office where he took two revolvers from his personal locker. Id. at 9-10. He entered a fifth bar, had one drink, and then drew a weapon and demanded money. Id. at 10. Someone knocked Ritchie unconscious, and he was subsequently arrested. Id. at 10-11.

Plaintiff alleges that he was a victim of a federal program, called "MKULTRA," dedicated to the research and development of drugs, including LSD, that might be used to alter human behavior. Compl. ¶¶ 18 & 26. Plaintiff maintains that he "first suspected that he might have been surreptitiously drugged" when he read the obituary of Dr. Stanley Gottlieb, a former CIA agent implicated in that agency's mind-control program, in the newspaper on March 15, 1999. Compl. ¶ 23. He found additional support for his suspicion in April 1999 when he read a diary entry of George White, an agent of the Bureau of Narcotics and allegedly the operating head of the CIA's "mind-altering program" in San Francisco. See Compl. ¶ 24; Ritchie Dep., Exh. B-12 (White was a senior employee at the San Francisco Federal Narcotics Bureau in the 1950s). White's December

20, 1957, diary entry stated, in part, "xmas party Fed bldg Press Room." Ritchie Dep., Exh. D; Compl. ¶ 25.[2] White was an MKULTRA subcontractor from approximately 1953 until 1964. McGinn Dec. ¶ 5. In that role, he established a safehouse apartment in San Francisco where drug tests were conducted on drug informants and prostitutes. Id. Defendant has also produced an extensive record of newspaper and television coverage documenting federal mind-control experimentation. Id., Exhs. A-C (newspaper articles) & X (books).

Today, neither party disputes that MKULTRA existed, and that Ira Feldman and George White were engaged in the involuntary drugging of unwitting suspects in San Francisco on behalf of the CIA. See generally 2nd Feldman Dec. Both sides agree further that plaintiff suffered a brief psychotic episode on the night of December 20, 1957, that resulted in his attempted robbery of the Shady Grove Bar. See, e.g., Gottlieb Rep., at 17 ("Brief Psychotic Disorder on December 20 1957"); Ketchum Rep., at 10 ("It is certainly appropriate... to regard Wayne's episode as a temporary psychotic disorder."). These cross-motions for summary judgment concern the particular questions of whether Wayne Ritchie was himself a victim of the CIA's MKULTRA program, and whether Ritchie can establish that this alleged drugging with LSD was the cause of his psychotic episode.

LEGAL STANDARD

Summary judgment is proper when the pleadings, discovery and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id. The moving party for summary judgment bears the burden of identifying those portions of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). On an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." Id.

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Mere allegations or denials do not defeat a moving party's allegations. Id.; see also Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 960 (9th Cir. 1994). The court may not make credibility determinations, Anderson, 477 U.S. at 249, and inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the motion. Masson v. New Yorker Magazine, 501 U.S. 496, 520 (1991).

DISCUSSION

I. Admission of the Levy and Loftus Declarations

At a case management conference held on November 5, 2003, defendant's counsel announced that she had filed Rule 26 reports for two additional expert witnesses, Dr. Mark I. Levy, M.D., and Dr. Elizabeth F. Loftus, Ph.D., within the past two days, and that she intended to rely upon the testimony of these two experts in her motion for summary judgment. Defendant had already long since filed Rule 26 reports for two other expert witnesses, and plaintiff had been afforded the opportunity to depose these witnesses. In light of the fact that this case is approximately three years old, and the fact that cross-motions for summary judgment have long been anticipated, the court noted that it did not look favorably upon the eleventh-hour introduction of defendant's third and fourth experts.[3] Nonetheless, the court stated that it would allow defendant to submit a declaration describing the necessity of having the court consider the declarations of Dr. Levy and Dr. Loftus, and might allow said testimony into the record were such necessity well established.

Defendant's counsel has failed to provide any reasonable argument that Dr. Levy and Dr. Loftus are essential to the proper resolution of these motions for summary judgment. In its proffer of their testimony, defendant merely restates its spurious claim that no deadlines existed in this case for the filing of expert reports and that defendant only became aware of the existence of these experts in September 2003. These assertions elide the fundamental points of timeliness at issue here, namely that this case is already several years old, and that plaintiff had already filed a motion for summary

judgment *before* defendant filed reports of its third and fourth experts. Reasonable diligence on the part of defendant's counsel would have brought these experts to the fore much earlier—the issues about which these individuals opine are not new, only the experts themselves are. Before this court could consider these two new experts in the context of this motion for summary judgment, it would be necessary to allow plaintiffs to depose them both and submit an updated declaration from plaintiff's own expert in response. These steps would likely occasion an additional delay in these proceedings of several months, if not more. Defendant has failed to offer any particularized explanation regarding the importance of the opinions offered by Dr. Levy and Dr. Loftus, or any reason that this court should agree to further postpone consideration of the parties' long-awaited motions for summary judgment on their or defendant's behalf. By consequence, the court declines to consider the declarations of Dr. Levy and Dr. Loftus in conjunction with these motions.[4]

II. Ritchie as Unwilling LSD Victim

A. Plaintiff's Principal Proffered Facts

1. Direct Evidence

In support of his motion for summary judgment on the issue of whether he was administered LSD unwittingly pursuant to CIA Subproject 42, Ritchie relies upon the confluence of several different pieces of evidence. The most important evidence, and the only direct indication that he may have been drugged, is the deposition testimony of Ira Feldman, a supervisory group head at the Federal Bureau of Narcotics (FBN), who worked under George White and Dr. Sidney Gottlieb (another CIA employee) on the MKULTRA project. Plaintiff first deposed Feldman on July 30, 2002; when further evidence linking Feldman to Project MKULTRA subsequently came to light this court permitted plaintiff to depose Feldman a second time. During this second deposition, taken on February 7, 2003, Feldman appears to admit that he administered LSD to Wayne Ritchie without Ritchie's knowledge or consent. Feldman gives this indication three times, though each reference is somewhat oblique. First, he states: "I drugged guys involved in about ten, twelve, period. [sic] I didn't do any follow-up, period, because it wasn't a very good thing to go and say 'How do you feel

today?' You don't give them a tip. *You just back away and let them worry like this nitwit, Ritchie.*" 2nd Feldman Dep., at 428 (emphasis added). Following that statement, Feldman engaged in a colloquy with plaintiff's counsel in which he appeared to inculpate himself in Ritchie's drugging a second time:

> Q. When you say 'let them worry,' you mean let them have a full head of LSD and let –
>
> A. Let them have a full head, like what happened, like what happened *with this nut when he got out and got drunk.*

Id. at 428-29 (emphasis added).

Later, Feldman was asked if he were essentially "deciding who was going to suffer," and implicitly referenced Ritchie a third time, replying that

> I didn't say anybody had suffered. I didn't say anybody suffered. *The bird, like this guy, who saw snakes coming out, he deserved to suffer. He had eight or ten drinks and then goes out and gets a couple of guns and tries to hold up someone.*

Id. at 435 (emphasis added). Feldman further explained that the LSD testing was undertaken in order to explore that drug's potential use "[b]oth in interrogation and in provoking erratic behavior." Id. at 369-70.

2. Circumstantial Evidence

Plaintiff also points to George White's diary entry from December 20, 1957, as further evidence that he had been unwittingly dosed with LSD. Feldman testified at his deposition that he would inform George White of his activities for MKULTRA, and that White exercised some degree of operational control over Feldman's activities. Explained Feldman, "When it [the LSD drugging] was done, and I got a report, I wrote it up and gave it to White, and I have no idea what White did with that report." Id. at 432. White's diary for December 20, 1957, notes that he was home with the flu but references a Christmas party in the Federal Building press room (White was stationed in San Francisco); Feldman identified White's writing in this diary entry.[5] Bender Dec. October 17, 2003, Exh. H, at 1; 2nd Feldman Dep., at 411. Feldman confirmed that White's illness would not have impeded his work; a planned LSD test would have taken place irrespective of whether or not White was sick and had to remain at home:

Q. If George White was home with the flu, would you continue to carry out your operations in terms of the job, as you knew it?

A. Of course. I was only an agent. I wasn't the boss.

Q. But you had certain assignments, and you would carry them out?

A. Absolutely.

Id. at 413. For his part, Ritchie avers that he attended that Christmas party, which took place in the San Francisco Post Office Building where he worked. Ritchie Dec. ¶ 4. Feldman indicated that the "Post Office Building" in which Ritchie worked and the "Federal Building" described in White's diary were one and the same. 2nd Feldman Dep., at 408-411. Both sides also agree generally that the CIA (and Ira Feldman in particular) was engaged in drugging unwitting victims with LSD in and around 1957. See generally 2nd Feldman Dep.

In addition, plaintiff points to the very fact of his behavior as evidence that he was under the influence of LSD. The parties' agreement that Ritchie experienced a psychotic episode is tantamount to agreement that his actions on the night of December 20, 1957, were completely out of character. Plaintiff alleges that his expert's diagnosis that he must have ingested LSD, coupled with Ira Feldman's apparent admissions, paint a compelling picture and constitute the necessary level of proof for a summary judgment motion on this issue. Plaintiff supplements this argument with the testimony of Dan Casey, a San Francisco-based federal narcotics agent who knew Ritchie and found his actions on the night of December 20, 1957, completely out of character. See Casey Dep., at 7-10. Since these medical diagnoses are relevant to the separate causal issue of Ritchie's attempt to isolate the particular catalyst for his psychotic episode, they are discussed at greater length below. The court addresses the dueling opinions of plaintiff and defendant's experts at length in Section III., *infra*, and discusses the importance of these diagnoses' to plaintiff's claim of having been drugged by the CIA at the December 20th Christmas party below in Section II.C.

B. Defendant's Principal Proffered Facts

The evidence that defendant offers in contradiction of Ritchie's claim centers around the *first* deposition of Ira Feldman, taken on July 30, 2002. In the course of that deposition, Feldman repeatedly stated that he had never heard of plaintiff, would not recognize him if shown a photo of

him, and had not administered LSD to him. See 1st Feldman Dep., at 245-46 ("Q: Now, did you remember a Deputy U.S. Marshal by the name of Wayne Ritchie? A: Never, never, never. I never – if he walked in here now, I wouldn't know him."). Feldman testified further that he did not even attend the Christmas party in the Post Office Building on December 20, 1957, at which plaintiff alleges he was dosed with LSD. Id. at 168-69 ("Q: Did you ever attend a holiday party over at the Post Office building? A: No, I didn't."). Placing the final categorical stamp on his denials of involvement in the substance of plaintiff's allegations, Feldman states that he never even entered the press room of the Post Office Building where plaintiff claims he was drugged. Id. at 237 ("Q: And what usually occurred in the press room? Was that for press conferences? A: I don't know. I was never there. I never was there. Q: You were never in that room? A: Never in that room.").

Defendant also points to an exchange that occurred towards the beginning of Feldman's *second* deposition in which Feldman again denies any knowledge of or involvement with the alleged doping of plaintiff with LSD. The exchange between plaintiff's counsel and Feldman is somewhat meandering, and each individual question and answer could appear ambiguous if not read in context, and so the conversation is reproduced at length below:

> Q: And could you give us, to the best of your recollection, some examples of the things that you now recall that happened to people... by giving LSD?
> ...
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> A: People would become very hallucinogenic. They would see things that they shouldn't see. They had trouble walking. They had trouble eating. A lot of people threw up, and a lot of people passed out.
> ...
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> Q: No. But I'm talking about your experience when you said "it made people act like jackasses."
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> A: Yes. When they fell down, when they spit all over themselves, yes, they are jackasses. Normal people don't act that way.
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> ...
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> Q: If somebody acted like a jackass, would that be erratic behavior?
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> A: It depends on what Webster says. I don't know what it is.
>
> Q: And how about if somebody went out and held up a bar? This would be erratic behavior, wouldn't it?

A: No. That would just be a drunken bum.

Q: Or would it be a jackass?

A: No. It wouldn't be a jackass. He would be a U.S. Marshal that got drunk and fell on his ass. That's what he would do.

Q: I see.

A: He doesn't come under this cover here.

Q: I see. You remember that situation?

A: *No. I don't remember that situation.* But this last two or three years it has all been your clients that got drunk. I don't remember the situation. *I wasn't even there, period. Nobody I knew was there.* He just got loaded and he fell on his ass and he pulled out a gun and he held up a bar. If you can beat that in court, be my guest.

Q: And you know, as a fact, sir, from your position and expertise in administering LSD, that he did not have LSD?

A: Do I know?

Q: Yes.

A: I don't know. I wasn't there. I didn't hear about it. I didn't see about it until it came out in the newspaper, God knows, how long afterwards. And not for 15, 20 years later I didn't know, no, didn't know a thing about it.

2nd Feldman Dep., at 352-355 (emphasis added). It was only later in Feldman's deposition that he appeared to admit having administered LSD to plaintiff, and it is the discrepancy between Feldman's remarks at various times that forms the crux of this question as placed before the court. See 2nd Feldman Dep., at 428-435 (supra pp 5-6).

C. Evaluation of Competing Claims

The principal difficulty in evaluating plaintiff's motion for summary judgment on the issue of his LSD drugging here arises from the fact that the plaintiff and defendant rely most heavily upon the same witness. Ira Feldman, the admitted CIA operative and one-time MKULTRA participant, stands at the very center of this case, and the question of which version of his story to believe forms the crux of this court's inquiry. On multiple separate occasions during his first and second depositions Feldman denied—under direct questioning—that he had participated in any drugging of Ritchie, or indeed that he had ever before seen or interacted with Ritchie. However, during his first deposition Feldman denied *ever administering drugs to unwitting suspects*, a denial that Feldman himself and others have since convincingly refuted. See, e.g., 1st Feldman Dep., at 36 ("Q. Mr. Feldman, did

you ever witness anybody slipping LSD to another person? A. Never did. Q. Did you ever slip LSD to another person? A. Never did. Never did."); id. at 245 ("Q. Did you ever slip LSD into anybody's drinks? A. Never did."); 2nd Feldman Dep., at 432 ("Q. So that every time that you gave somebody LSD, Sidney Gottlieb was along? A. No, he wasn't along. But he most likely knew these people."). Like the thirteenth chime of a broken clock, the demonstrably incorrect statements in Feldman's first deposition cast doubt upon all those that preceded them.

However, Feldman's denials at the beginning of his second deposition are no more equivocal. At the beginning of Feldman's second deposition, plaintiff's counsel showed Feldman a transcript of an interview that Feldman had given in which he admitted to having administered LSD to numerous non-consenting individuals. See 2nd Feldman Dep., at 345-46. Confronted with this evidence, Feldman lacked a compelling reason to continue to lie about his involvement with MKULTRA and could hardly perpetuate his denials with any semblance of credibility. It thus remains significant that, at least at first, he continued to resolutely deny ever having drugged Wayne Ritchie.

By comparison, the statements that appear to implicate Feldman in Ritchie's alleged drugging do so only obliquely: Feldman compares Ritchie's psychotic episode to the actions of an LSD victim without stating positively and explicitly that he knew Ritchie to have consumed LSD. See 2nd Feldman Dep., at 428-429 ("You just back away and let them worry like this nitwit, Ritchie. ... Let them have a full head, like what happened, like what happened with this nut when he got out and got drunk."); id. at 435 (identifying Ritchie as an LSD victim by saying "[t]he bird, like this guy, who saw snakes coming out, he deserved to suffer [from having had LSD administered]. He had eight or ten drinks and then goes out and gets a couple of guns and tries to hold up someone."). From the first moment of his deposition Feldman undoubtedly knew that Wayne Ritchie was alleging that he had been drugged with LSD; Feldman might easily have assumed that Ritchie's drugging was a foregone conclusion, and that the only remaining question concerned whether Feldman had participated in that drugging himself. In fact, Feldman's first putative self-implication came directly after plaintiff's counsel had referenced a San Francisco Chronicle article entitled "Good Guy Fails as Bad Guy" written in 1957 about Ritchie's attempted armed robbery. See 2nd Feldman Dep., at 427-28. The nature of Feldman's subsequent remarks— whether the reference to Ritchie's robbery triggered an unconscious admission or merely induced Feldman to offer a needless and unfortunate

comparison—remains shrouded in uncertainty. Nevertheless, it is inescapable that other explanations beyond Feldman's guilt exist to explain his remarks.

It is also noteworthy that on no occasion did plaintiff's counsel follow Feldman's allusions to Ritchie with more direct questioning designed to pin down precisely what Feldman intended to be saying.[6] The absence of such questioning certainly does not eviscerate the potential veracity of plaintiff's asseverations regarding Feldman's admissions, but nonetheless it leaves this court in the position of essentially inferring facts from sideways comments, rather than explicit testimony. Plaintiff thus can hardly be surprised when this court finds it difficult to grant summary judgment on such grounds.[7]

Plaintiff also urges this court to consider his aberrant behavior on the night of December 20, 1957—and his expert's diagnosis attributing this behavior to ingestion of LSD—when deciding his motion for summary judgment on the issue of whether the CIA did, in fact, drug him. Meanwhile, defendant's cross-motion for summary judgment raises the separate issue of whether plaintiff can prove causation, viz., that his robbery attempt was caused by LSD and not alcohol or some other catalyst. The question of causation, and the differing assessments offered by plaintiff and defendant's experts, are thus discussed in detail in the sections that follow, and the court will not re-capitulate ("pre-capitulate") them here. For present purposes, it suffices only to state that these diagnoses are themselves sufficiently divided (and divided in a manner that this court cannot resolve in the context of cross-motions for summary judgment) that they add little to the analysis at this stage.

In addition, plaintiff's expert reached his conclusion attributing plaintiff's robbery attempt to the ingestion of LSD in large degree because of the separate accusations (and supporting evidence) that plaintiff had been unwittingly administered that drug. Absent such allegations and background, and faced with merely a cold medical record, it seems unlikely that plaintiff's expert would have independently fixed upon LSD as the precise cause of plaintiff's actions, eliminating from consideration all other potential psychological factors.[8] Thus, it is largely circular for plaintiff to attempt to buttress his allegation of CIA drugging with an expert assessment that itself draws heavily upon that same allegation; plaintiff's expert's various reports heavily reference Ritchie's allegations from this action. See, e.g., Ketchum Reply to Abraham Rep., at 12 ("Turning to Mr. Ritchie's belief

that he was drugged with LSD by the CIA, this is not an idle fantasy or a delusion lacking real-world foundation....").

Unsurprisingly, plaintiff and defendant paint substantially different pictures of the events of December 20, 1957, pictures that incorporate both direct testimony and the opinions of experts writing forty-five years after the fact. In light of these divergent perspectives, the opinions offered by each party's experts do not shed substantially new light on—nor force a substantial re-evaluation of—the factual questions that existed in the first place. By consequence, the testimony of Ira Feldman remains the singularly salient source of evidence on this issue.

Whatever else they may indicate, Feldman's disparate assertions certainly do not constitute such an overwhelming body of evidence that no reasonable juror could find other than that Ritchie was an unwitting victim of CIA Subproject 42. The lack of a direct, positive statement by Ira Feldman that he did, in fact, participate in (or at least knew of) Ritchie's drugging is most significant here. Without a clear, categorical admission of involvement by Ira Feldman it is simply impossible for this court to conclude that no reasonable juror could find against plaintiff; under such circumstances, and in the absence of such evidence, summary judgment for plaintiff is improper. Anderson, 477 U.S. at 248. At the same time, however, Feldman's sideways assertions do raise at least a triable issue of fact on this question—faced with Feldman's contradictions and the possibility that he may have truthfully, though unwittingly, inculpated himself, a reasonable jury would be capable of finding for plaintiff. Motions for summary judgment on fact issues such as these do not ask the court for its best judgment on the veracity of a claim; the court's only role is to eliminate issues of fact upon which there can be no reasonable disagreement. Despite the vagaries of Feldman's responses—and his repeated unequivocal denials of involvement—this is an issue about which reasonable jurors might well disagree. The court hereby denies both plaintiff's and defendant's motions for partial summary judgment on the issue of whether "Wayne Ritchie was an unwitting victim of CIA Subproject 42."

III. LSD Causation

Defendant has moved for summary judgment on the issue of whether plaintiff has adduced sufficient evidence to present a triable issue of fact regarding the question of whether his behavior on the night of December 20, 1957, was in fact due to ingestion of LSD. Both sides agree that plaintiff

suffered a brief psychotic episode that night that resulted in his attempted robbery of the Shady Grove Bar. See, e.g., Gottlieb Rep., at 17 ("Brief Psychotic Disorder on December 20 1957"); Ketchum Rep., at 10 ("It is certainly appropriate... to regard Wayne's episode as a temporary psychotic disorder."). Defendant has introduced the declarations of two psychiatric experts, Dr. Kenneth I. Gottlieb, M.D., and Dr. Henry D. Abraham, M.D., both of whom opine that plaintiffs' actions and symptoms were more likely caused by the alcohol he ingested than by any potential doping with LSD.[9] Plaintiff relies upon the declaration of Dr. James S. Ketchum, M.D., another psychiatric expert, who argues that Ritchie's psychotic episode was most likely caused by LSD, rather than alcohol, in part because Ketchum does not believe that Ritchie would have been substantially affected, either on a short- or long-term basis, by the alcohol that he did consume. This case is made particularly difficult by the more than forty years that elapsed between Ritchie's psychotic episode and the psychiatric examinations used here to provide proof of causation (or lack thereof). Nevertheless, the court can only proceed with the evidence before it and weigh if carefully considering the length of time that has passed.

A. Defendant's Principal Proffered Facts

Defendant's motion for summary judgment centers on the claim that Ritchie's behavior was caused by both his near-term and long-term drinking. Ritchie was, by all accounts, a regular and occasionally heavy drinker. See, e.g., Abraham Rep., at 7 ("The plaintiff admits a past history of the excessive consumption of alcohol."); id. at 8 ("The plaintiff qualifies on [the Michigan Alcohol Screening Test] scale as a problem drinker at least during the years 1949 through 1957."). Three separate times within the years preceding 1957, Ritchie had consumed as many as 15 to 25 drinks during one evening. Ketchum Reply to Abraham Rep., at 6. On Friday, December 20, 1957, Ritchie consumed approximately eight bourbon and sodas, beginning around noon at the Christmas party in the Post Office Building and ending that evening at approximately 9:00 pm with his attempted robbery. Ritchie Dec. ¶ 4-10; Abraham Rep., at 3. The majority of this drinking occurred between 2:00 and 3:15 pm, upon Ritchie's second visit to the allegedly fateful Christmas party, where he consumed three to four bourbons. Ritchie Dec. ¶ 6.

Dr. Gottlieb bases his conclusion that Ritchie could not have been drugged with LSD on two principal factors. First, he notes that Ritchie did not seem to display the indicia of one who had been administered such a hallucinogen. He did not hallucinate. Gottlieb Rep., at 3. He did not

experience excess sweating, blurred vision, shaking, or loss of coordination, and there is no mention of Ritchie having dilated pupils; according to Dr. Gottlieb, all of these are regularly documented symptoms of LSD use. Id. In addition, Dr. Gottlieb notes that "the plaintiff does not describe psychiatric afflictions characteristic of the post-LSD period." Id. at 4. In sum, Dr. Gottlieb concludes, "the plaintiff describes virtually none of the classical mental or physical features of the acute drug state." Id. at 13. Second, Dr. Gottlieb claims that an LSD victim would not normally be capable of formulating a plan to commit a robbery, including taking the necessary predicate steps. as did Ritchie. Gottlieb writes that "[t]he planning and execution of a robbery, even a failed one, requires far more executive mental function than LSD ordinarily permits." Id. It is worth noting that Gottlieb does not claim to be offering a medical opinion that Ritchie was not given any LSD on December 20th; he believes simply that Ritchie cannot have been under the influence of LSD when he attempted to commit armed robbery. See Gottlieb Dec., at 60 ("Q. ... Doctor, have you expressed an opinion to a reasonable degree of scientific certainty that Mr. Ritchie did not have any LSD on December 20, 1957? A. No."). Dr. Gottlieb also does not deny that LSD is a powerful narcotic, or that it may produce bizarre behavior in those who ingest it. See id. at 59 ("LSD can make people very, very crazy.").

Rather, according to Dr. Gottlieb, "the plaintiff's behavior is quite consistent with numerous studies in the literature associating the use of alcohol with crime." Id. at 14. Interestingly, Dr. Gottlieb does not claim that Ritchie was actually drunk in the classical sense of the word. Dr. Gottlieb stated during his deposition that Ritchie "wasn't behaving in a drunk manner at all." Gottlieb Dep., at 65-66. Instead, Gottlieb opines that

> the condition from which... Mr. Ritchie suffered was a psychotic state induced by alcohol. In the old days it would be called alcoholic hallucinosis. It is not related to being intoxicated with alcohol. It is associated with chronic alcohol ingestion, but it is not connected with alcohol intoxication.

Gottlieb Dep., at 65. Dr. Gottlieb thus does not rely upon the number of drinks that Ritchie consumed on December 20, 1957, as the causal factor for his behavior, but instead attempts to link Ritchie's actions to his longstanding consumption of alcohol.

In much the same fashion, defendant's second expert, Dr. Abraham, opines that Wayne Ritchie could not possibly have been under the influence of LSD at the time of his robbery because he did not display any of the typical physical indicia of an individual who has consumed that drug.

Dr. Abraham conducted a psychiatric examination on March 31, 2003, at the United States Attorney's Office in San Francisco and formed his opinions based on his analysis of Ritchie in that forum. Abraham Rep., at 1. Abraham's conclusions are relatively straightforward:

> Physically there is no report of bodily changes characteristic of LSD. There was no mention of dilated pupils made by anyone at anytime, (including a physician treating him for a head injury later that night). The plaintiff described some palpitations. But there was no excess sweating noted, no blurring of vision, shaking, or a loss of coordination. As he shared with me, "I didn't spill any drink at all."
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> ...
>
> In the ensuing years the plaintiff does not describe psychiatric afflictions characteristic of the post-LSD period. That is, he described no recurrent perceptual flashbacks suggesting hallucinogen persisting perception disorder, such as trailing imagery or protracted afterimagery commonly seen following the use of LSD.

Id. at 3-4. Instead, Dr. Abraham believes that plaintiff is suffering from delusions brought on through a combination of his drinking and various of his personality traits, including "a hypersensitivity or even an imagined sense of rejection." Id. at 14. Dr. Abraham adds that

> [t]hese traits are consistent with a mixed personality disorder, with features of the avoidant, paranoid, and obsessive types. More to the point, they are likely to have been predisposing factors that led to the brief psychotic reaction the plaintiff appears to have suffered on under the influence of a large amount of alcohol.

Id. at 15.

B. Plaintiff's Principal Proffered Facts

Plaintiff's expert, Dr. Ketchum, makes a number of points by way of response to defendant's experts' contentions. Ketchum performed a so-called "differential diagnosis" upon Ritchie in which he believes he successfully dis-aggregated the various potential causal factors behind Ritchie's December 20, 1957, psychotic episode. Dr. Ketchum concludes that only LSD—not the alcohol Ritchie consumed nor any underlying neurological disease—can explain the events of that evening: "the only plausible explanation for the mental and emotional changes accompanied by the bizarre behavior shown by Mr. Ritchie on the day of his arrest is the ingestion of a pharmacological agent." Ketchum Rep., at 8. Foremost within his argument is the claim that Ritchie could not have been seriously intoxicated by the time he attempted to commit the robbery around 9:00 pm. Since Ritchie had only eight drinks in a period of nine hours, Ketchum estimates that his blood alcohol content would have been approximately 20 mg%, well below the legal limit[10] and far too low to "produce this entire scenario" of incapacitation and robbery. Ketchum Reply to Abraham Rep., at 3-6. Notes

Ketchum, "[p]harmacological studies of healthy non-alcoholic volunteers have demonstrated that this amount of alcohol is almost completely metabolized within such a time period." Ketchum Rep., at 11-12.

Ketchum also rejects the theory that Ritchie suffered from the type of long-term alcohol-induced psychosis that Dr. Gottlieb credits with causing his psychotic incident. Ketchum believes that "[t]he effects of alcohol alone do not explain the perceptual distortions, paranoid delusions, depression, poor judgment and loss of reality testing, nor the attempted commission of an illogically conceived, and ineptly executed criminal act." Ketchum Rep., at 8. Explains Ketchum further, "[a]lcohol-induced psychosis... is associated with a prolonged period of heavy drinking and generally persists for days or weeks if untreated." Ketchum Rep., at 11 (emphasis in original). Ritchie's case, argues Ketchum, fulfills neither of these conditions. Argues Ketchum, "[t]here is nothing to suggest a significant alcohol problem in his pre-1957 history, nor any indication that any of his colleagues or supervisors considered him to be a problem drinker." Ketchum Reply to Gottlieb Rep., at 1-2.

Rather than attributing Ritchie's actions to alcohol, Ketchum argues that Ritchie's behavior is entirely consistent with what might be expected of someone who had been dosed with LSD, particularly given the variability in effects that different doses administered under different conditions can produce. Noting that "the dose of LSD is unknown in this case," Ketchum remarks that "[d]oses as small as 30-50mcg, which may produce no outward signs, can cause marked disturbances in thinking and emotion." Ketchum Reply to Abraham Rep., at 7. Dr. Ketchum also links Ritchie's ever-increasing paranoia[11] on the night of December 20th to ingestion of LSD: "This type of expanding delusion is characteristic of LSD effects. Once a paranoid line of thought occurs under the influence of LSD, everything else seems to corroborate it." Id.

Ketchum also disputes defendant's contention that an individual under the influence of LSD would be incapable of formulating the type of plan—involving several coordinate steps—that Ritchie had concocted to rob the bar at which he was eventually arrested. Id. Ketchum notes that his experience with LSD patients and his perception of them does not comport with Dr. Abraham's impression that they would be unlikely to commit such a crime: "A 'tongue-tied, blissed out, passive state' is certainly not typical of what I have observed in almost 100 volunteers, and dozens of Haight-Ashbury patients in 1967-68, most of whom went through a range of emotions and frequently were paranoid at times." Id. Finally, Ketchum takes issue with the significance that Dr. Abraham

attaches to Ritchie's supposed lack of flashbacks subsequent to his alleged experience with LSD. Dr. Ketchum argues first that Ritchie "did have flashbacks, in the sense that a vivid reliving of the criminal behavior would suddenly occur unexpectedly while in the grocery store, painting, etc." Id. at 13 (emphasis in original). More to the point, Ketchum would not consider it surprising even if Ritchie were not subject to flashbacks, since one study "has reported from a large meta-analysis that most of those who have taken LSD do not report significant flashbacks, and if they do they usually occur only for a few days or weeks." Id.

C. Evaluation of Competing Claims

Defendant urges this court to grant summary judgment on the issue of whether LSD caused Ritchie's psychotic episode, arguing that the testimony of plaintiff's expert, when compared with that of defendant's experts, does not create a substantial issue of material fact. Upon consideration of all available evidence, this question devolves into a form both familiar to—and intractable for—the courts: the cliched "battle of the experts." Adding to the traditional difficulties in analyzing expert testimony that attend any case in which experts play a significant role is the nature of the evidence presented here. Plaintiff and defendant's experts are examining Ritchie more than 45 years after the events which gave rise to this action, and much of their reportage takes the form of psychiatric evaluation. By consequence, they are forced to rely in large part upon their experience in dealing with similar patients (some of whom may have ingested alcohol or LSD) in previous situations. See, e.g., Abraham Rep., at 13-14 (noting that plaintiff's behavior on the night of December 20, 1957, "does not conform to the mental state of tongue-tied, blissed-out, passive LSD cases I have observed in the last thirty years"); Ketchum Reply to Abraham Rep., at 7 (referencing his work with 100 LSD-ingesting volunteers and patients in a San Francisco clinic over thirty years ago). Moreover, they must draw conclusions based upon analogies between plaintiff's statements and a very limited knowledge foundation: there is hardly a plentiful public record of medical studies of LSD's effect on humans and nothing approaching medical consensus on the relevant issues.

This confluence of medical difficulties has rendered the experts unable to engage one another at the type of logical level that might enable this court to resolve the relevant issues on summary judgment. The parties' experts seem to lack the type of common experiences that might place their diagnoses on congruent planes; rather, they appear largely to talk past one another. It is difficult to quarrel with an expert who states that in his "extensive experience," his patients have generally

behaved in a certain manner; an argument from general experience cannot be conclusively rebutted by more of the same.

Furthermore, plaintiff's expert's reasoning simply does not contain any prominent, dispositive logical gaps that defendant's experts can exploit. Dr. Ketchum has come to a well-reasoned, coherent conclusion—one that defendant's experts reasonably dispute, to be sure, but one that is not plainly incorrect or misinformed. It is not the role of this court upon a motion for summary judgment to pick between these competing experts; that task is left to the factfinder at trial. Anderson, 477 U.S. at 249. It remains only for this court to ascertain whether a reasonable jury could legitimately find for plaintiff on the issue of causation given the evidence presented, and on that account the court is satisfied that plaintiff's expert has made a sufficient showing to enable a reasonable jury to hold in its favor. Id. at 248.

CONCLUSION

For the reasons stated above, the court DENIES plaintiff's motion in its entirety, and DENIES defendant's motion in its entirety.

IT IS SO ORDERED.

Dated: May 24, 2004

MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
For the Northern District of California

ENDNOTES

1. Neither defendant nor plaintiff has been entirely clear regarding the issues they have asked the court to decide on summary judgment. As noted above, plaintiff has requested summary judgment simply on the question of whether Ritchie was "an unwitting victim of CIA Subproject 42," while defendant has requested summary judgment on the issue of "causation." Defendant appears to contest what might be considered both parts of the causation question—whether Ritchie can show that he was actually administered LSD, and whether he can demonstrate further that this LSD caused him to attempt an armed robbery. Plaintiff's summary judgment motion is somewhat less clear, but it appears to focus primarily upon the question of whether he was ever actually dosed with the drug, not whether his subsequent behavior is attributable to that dosing. (Plaintiff's opposition brief seems to incorporate this second question in addition, but that fact is irrelevant. Plaintiff cannot introduce new issues to be decided in his responsive pleadings.) As a result, this court will assume that defendant has filed a motion for summary judgment on both causation questions, and that plaintiff has filed a motion for summary judgment only with regard to whether the CIA administered him LSD.

2. The full entry reads: "home flu – xmas party Fed bldg Press Room." Ritchie Dep., Exh. D.

3. In support of his motion for summary judgment and in opposition to defendant's, plaintiff has proffered one expert witness, Dr. James S. Ketchum, M.D. Dr. Ketchum's expert declaration was filed in 2002, and defendant subsequently deposed Dr. Ketchum.

4. Defendant asserts with some vehemence that neither expert's testimony would be redundant or cumulative in view of the two experts already proffered by defendant. While this asseveration indeed appears to be correct, Dr. Levy's testimony is instead, quite ironically, contradictory to that of Dr. Abraham and Dr. Gottlieb. Dr. Abraham and Dr. Gottlieb both concluded, on the basis of available evidence, that Ritchie's psychotic episode was more likely caused by alcohol than by ingestion of LSD. Dr. Levy, on the other hand, opines that "there is no known scientific method by which, retrospectively, 47 years after the fact, an accurate determination can be made as to whether the brief psychotic episode allegedly experienced by Mr. Ritchie on December 20, 1947, [sic] was caused by Mr. Ritchie's admitted contemporaneous heavy use of alcohol as opposed to his having been surreptitiously drugged with LSD or some other hallucinogenic agent." Levy Decl. ¶ 2. While this approach does add another potential basis according to which this court could find in favor of defendant, it simultaneously serves to undermine the arguments which defendants' other experts had advanced with such certainty.

5. Defendant notes that the December 20, 1957, Christmas party is one to which presumably all federal law enforcement employees in San Francisco were invited, and thus the entry in George White's diary may indicate that he was referencing the gathering as little more than a social event. In fact, White's diary contains a similar entry on December 21, 1956; on that date, it reads "Christmas party press room." 2nd Feldman Dep., at 408.

6. Plaintiff protests that the obdurate behavior of defendant's counsel is to blame for his inability to ask such a follow-up question, and indeed the record of Feldman's deposition appears to support this contention. The most notable interruption came as Feldman appeared to be implicating himself in Ritchie's drugging for the third time:

> A. I didn't say anybody had suffered. I didn't say anybody suffered. The bird, like this guy, who saw snakes coming out, he deserved to suffer. He had eight or ten drinks and then goes out and gets a couple of guns and tries to hold up someone. And then he waits –
>
> MS. KENNEY [defendant's counsel]: Mr. Feldman –
>
> MR. BENDER [plaintiff's counsel]: He is answering the question. I object to your doing that at a critical time like this. You have some nerve to interrupt that witness now. That's horrible.
>
> MS. KENNEY: He appears to be spacing out.
>
> MR. BENDER: He is not spacing out. You may be spacing out because of the testimony he is giving.
>
> MS. KENNEY: The video will show it.
>
> MR. BENDER: It sure will.
>
> MS. KENNEY: Go ahead.
>
> MR. BENDER: Will you pick up where he left off? Will you read it to him?
>
> MS. KENNEY: We have been sitting here since –
>
> MR. BENDER: We are in the middle of an answer
>
> MS. KENNEY: We have been sitting here since 1 o'clock this afternoon. At a convenient time we will take a break.
>
> MR. BENDER: We had a break.
>
> MS. KENNEY: You tell me when it is convenient. But sometime between now and 4:00.
>
> MR. BENDER: Who do you think you are, to interrupt this witness like that at a critical time? You know what you are doing.
>
> MS. KENNEY: Excuse me. I don't agree with you that it is at a critical time.

MR. BENDER: You know. That is why you did it.

MS. KENNEY: I don't agree with you.

MR. BENDER: Of course you don't.

MS. KENNEY: Do you want the reporter to read it back?

MR. BENDER: Please give him his answer as he is giving it.

(Record read).

Q. Do you want to continue?

A. No. That's it. That's all I remember.

Q. Can you give us some instances, when you were working with White, about who should be drugged?

A. No. I couldn't give you any instances at all.

MR. BENDER: Okay. Let's take a break.

2nd Feldman Dep., at 435-38. Plaintiff is correct that defense counsel interfered improperly with his attorney's deposition of Ira Feldman, and that these interruptions may well have denied plaintiff the opportunity to solicit further valuable testimony. Nevertheless, plaintiff's counsel never pressed this issue by asking Feldman again if he had drugged Wayne Ritchie and then pointing to his earlier testimony were he to again deny the charge.

7. Feldman's potentially contradictory replies add to this summary judgment motion an issue of credibility. Feldman's more explicit denials of having drugged Ritchie cannot help but cast doubt upon his subsequent references to involvement in those same alleged acts. At the same time, this court allowed plaintiff to take Feldman's deposition twice precisely because new information had come to light that might allow the plaintiff to elicit more useful—or even more truthful—information from Feldman. The circumstances present a conundrum for any fact-finder tasked with determining which of Feldman's several conflicting recitations of history to believe. Fortunately, this task does not permissibly fall to the court at this stage. This court may not make credibility determinations in the context of a motion for summary judgment. Anderson, 477 U.S. at 249.

8. Indeed, as described further below, plaintiff's expert opines that Wayne Ritchie was under the influence of a "pharmacological agent," not that he was specifically administered LSD.

9. Dr. Abraham conducted a psychiatric examination of plaintiff in March of 2003. Dr. Gottlieb never examined plaintiff personally; he relied solely upon the written record in this case and the videotape of Dr. Abraham's examination.

10. Ketchum evidently provides this fact not because it carries any legal significance, but merely as a useful metric for describing in commonly understood terms Ritchie's level of intoxication.

11. Ritchie claims that the driving motivation behind his commission of the robbery was his belief that "everyone was against" him, including his fellow officers, co-workers across the hall, and even people at the bars he visited. Ritchie Decl. ¶¶ 7-9. This paranoia only increased as the night progressed.